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I. Introduction

This Article summarizes and discusses important developments in North Dakota oil and gas law between August 1, 2019, and July 31, 2020. Part II of this Article will discuss common law developments in both state and federal courts in North Dakota and Part III will discuss the state's recent legislative and regulatory developments.

II. Judicial Developments

A. Supreme Court of North Dakota

Pennington v. Continental Res., Inc.

In *Pennington*, the Supreme Court of North Dakota held that a force majeure clause applied to the primary and secondary terms of an oil and gas lease but remanded the case to find whether Continental had acted diligently and in good faith in obtaining a drilling permit.[1] In 2011, the Plaintiffs signed oil and gas leases that were for an initial term of three years with a lessee option to extend for one year that also had a force majeure clause that said the oil and gas leases would not expire if drilling operations were delayed due to acquiring permits.[2] Continental was assigned the leases in 2014 and utilized the extension option where its application for a drilling permit on 2,650 acres was delayed due to an endangered species.[3] Continental then created a 1,920 acre area to remove the endangered species from the permit area to expedite the permitting process and began drilling in January of 2016.[4]

The Plaintiffs sued Continental arguing that the leases were expired and Continentals "delay in obtaining regulatory approval to drill did not extend the leases"[5], and that the delay was unreasonable because Continental could have drilled on a smaller portion of land during the primary portion of the lease.[6] Each party moved for summary judgment, but the district court found that the force majeure clause extended the leases and ruled for Continental.[7]

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1. Pennington v. Continental Res., Inc., 2019 ND 228, 932 N.W.2d 897, 902–03 (N.D. 2019).
2. *Id.* at 899.
3. *Id.*
4. *Id.*
5. *Id.* at *900.*
6. *Id.* at 902.
7. *Id.*

On appeal, the Supreme Court of North Dakota affirmed that the force majeure clause applied to both the primary and secondary terms of the lease because no limiting language was found in the lease.[8] The court stated a force majeure clause needs proof of diligence and good faith[9] and remanded the case because the district court did not consider "whether Continental acted diligently and in good faith in pursuing a permit to drill the 2,560-acre spacing unit for more than three years."[10]

Continental Res., Inc. v. North Dakota Dep't of Envtl. Quality

The Supreme Court of North Dakota held that a suit is not ripe for judicial review when administrative remedies remain available.[11] Continental sought a declaratory judgment to eliminate uncertainty found in North Dakota Administrative Code § 33-15-07-02(1) where it states "No person may cause or permit the emission of organic compounds, gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are burned by flares, or an equally effective control device as approved by the department."[12] Continental argued that the current limit of technology did not allow it to follow the code.[13] Continental also stated that in issuing a Notice of Violation, the Department had "abruptly changed course in its enforcement."[14] The department argued, among other things, that Continental's claim was not ripe for judicial review.[15]

Because administrative remedies remained available to Continental, the district court granted the Department's motion to dismiss.[16] On appeal, Continental argued that a declaratory judgment, even with administrative remedies available, was appropriate when the claim is a question of law.[17] The Supreme Court of North Dakota was not persuaded and reasoned that because the Department was the appropriate entity to determine if the technology existed combined with the unambiguous plain language of the

8. *Id.*
9. *Id.* at 902 (citing Entzel v. Moritz Sport and Marine, 2014 ND 12, 841 N.W.2d 774, 778 (N.D. 2014))(citation omitted).
10. *Id.* at 903 (citing *see* Entzel, 841 N.W.2d at 778 (N.D. 2014)).
11. Continental Res., Inc. v. North Dakota Dep't. of Envtl. Quality, 2019 ND 280, 935 N.W.2d 780, 785 (N.D. 2019).
12. *Id.* at 782.
13. *Id.*
14. *Id.* at 783.
15. *Id.*
16. *Id.* at 784.
17. *Id.*

rule, that Continental was attempting to change the rule instead of seek clarification to ambiguity.[18] Consequently, the court affirmed the judgment to dismiss the suit.[19]

Hess Bakken Investments II, LLC v. AgriBank, FCB

The Supreme Court of North Dakota held that a lease phrase "actual drilling operations" was ambiguous and subsequently remanded the case.[20] In 2004, Hess and two other companies ("Hess Group") acquired working interest as a non-operating interest owner in two leases ("Subject Leases") that would expire in April 2012 with Continental acting as the operator of the wells.[21] The Subject Leases had provisions that stated the leases would not terminate if "actual drilling operations" were ongoing.[22] In March 2012, Continental conducted preparatory work for drilling operations.[23] In April 2012, the Subject Leases were assigned to Intervention Energy and Riverbend Oil & Gas ("Intervention").[24] Hess Group sued to quiet title and for a declaration that the Subject Leases were not expired.[25] The district court granted Intervention's motion to dismiss and reasoned that actual drilling operations meant "placing the drill bit in the ground and penetrating the soil" to find that the Subject Leases were expired.[26]

On appeal, Hess Group contended that the word "operations", out of "actual drilling operations", included the preparatory work Continental conducted in March 2012 which extended the expiration of the Subject Leases.[27] Intervention on the other hand, asserted that "actual" meant "drilling into the ground."[28] The Supreme Court of North Dakota held that because each party had rational interpretations to the phrase, the parties rendered the phrase ambiguous.[29] Further, the existence of ambiguity meant

18. *Id.* at 785.
19. *Id.*
20. Hess Bakken Investments II, LLC v. AgriBank, FCB, 2020 ND 172, 946 N.W.2d 746, 750 (N.D. 2020).
21. *Id.* at747.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id. at748.*
27. *Id. at748-79.*
28. *Id.* at -749.
29. *Id.* at -750.

it was improper to dismiss the suit as a matter of law and therefore, the court reversed the dismissal order and remanded the case.[30]

B. Federal Courts

Kodiak Oil & Gas (USA) Inc. v. Burr

On appeal from a case previously discussed in volume four, number three of this Article, the U.S. Court of Appeals for the Eighth Circuit held that sovereign immunity did not bar claims for injunctive relief,[31] tribal court remedies were exhausted prior to filing suit in federal court,[32] and that factors weighed in favor of a preliminary injunction against tribal court jurisdiction over the case.[33] In 2014, individual members of three different tribes sought to recover royalty payments when three separate companies were accused of burning flares, thus committing waste and breaching lease agreements.[34] Two companies, Kodiak and HRC Operating, LLC("Kodiak"), filed suit in federal court, where the cases were combined, for declaratory and injunctive relief against the plaintiffs and the tribal court judge ("tribal court officials") after the tribal court ruled it had jurisdiction over the dispute.[35] The district court granted the companies' motion for preliminary injunction and dismissed the tribal judge's motion to dismiss.[36]

On appeal, the tribal court officials argued that sovereign immunity barred the suit in federal court[37] and that Kodiak did not exhaust tribal court remedies.[38] The court reasoned that the tribal court did not have jurisdiction because oil and gas leases arise under federal law and therefore, contract disputes to the leases are a federal question.[39] Also, because tribal court authority of non-tribe members was limited to either a consensual commercial relationship between a tribe member and non-tribe member or when the tribe was protecting the autonomy to its internal relations, the court found that neither scenario was applicable to the current suit.[40] Therefore, because federal law applied and not tribal law, the court found

30. *Id.*
31. Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1132–33(8th Cir. 2019).
32. *Id.* at 1132.
33. *Id.* at 1139.
34. *Id.* at 1130.
35. *Id.*
36. *Id.*
37. *Id.* at 1131.
38. *Id.* at 1133.
39. *Id.* at 1136.
40. *Id.* at 1138.

tribal jurisdiction improper, and that Kodiak had exhausted their tribal court remedies.[41] Consequently, the court held that the district court did not abuse its discretion because Kodiak showed a strong likelihood of success on the merits and the balance of factors favored Kodiak.[42]

Enerplus Res. (USA) Corp. v. Wilkinson

On appeal from a case previously discussed in volume four, number three of this Article, the U.S. Court of Appeals for the Eighth Circuit held that the merger of two companies, one of which owned oil and gas leases, was not an assignment that would prompt Indian American law and that there was no dispute as to the amount owed.[43] In 2010, Peak North and Wilkinson entered into settlement agreement where Wilkinson gained an overriding royalty interest ("ORRI") in some oil and gas leases.[44] Peak North later merged with Enerplus.[45] Enerplus then, by clerical error, overpaid Wilkinson by nearly three million dollars in royalty payments.[46] In seeking to recoup the overpayment, Enerplus filed suit in federal court in accordance with a forum section clause found in the settlement agreement with Wilkinson and Peak North.[47] The district court granted a preliminary injunction, denied Wilkinson's motion to dismiss, and ordered the money to be placed in the court's registry.[48]

Wilkinson then appealed the court's grant of the preliminary injunction only to be affirmed by the Court of Appeals for the Eighth Circuit. Enerplus then moved for summary judgment to recoup the overpayment to which Wilkinson argued it lacked standing to enforce the forum selection clause because "the Settlement Agreement incorporates by reference the underlying leases, which prohibit the assignment of mineral interests without approval from the Secretary of the Interior" in accordance with American Indian reservation law.[49] The district court ruled that Enerplus had standing because Peak North and Enerplus merged and therefore, there was no assignment.[50] Enerplus then filed another motion for summary judgment to enjoin Wilkinson from claims regarding the settlement,

41. *Id.* at 1133.
42. *Id.* at 1139–40.
43. *Enerplus Res. (USA) Corp. v. Wilkinson*, 801 Fed.Appx. 448 (8th Cir. 2020).
44. *Id.* at 449.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 450.
49. *Id.*
50. *Id.*

assignment, and enjoin the tribal court from exercising jurisdiction.[51]The district court ruled for Enerplus and included attorney's fees and costs.[52]

Wilkinson's motion for reconsideration was denied, but on appeal Wilkinson argued Enerplus lacked standing and that the ORRI percentage used by Enerplus was incorrect, thus there was an issue of material fact as to the amount Enerplus claimed. The Court of Appeals for the Eighth Circuit held that: (1) Enerplus had standing because Peak North and Enerplus had merged which avoided any need for approval of an assignment by the Secretary of the Interior and (2) because Wilkson failed to pursue evidence of a dispute in discovery, there was no dispute as to the overpayment amount.[53]As a result, the court affirmed the district court's grant of summary judgment in favor of Enerplus.[54]

Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC

In *Pitchblack*, the U.S. Court of Appeals for the Eighth Circuit held that overriding royalty interests found in a lease would not burden Top Leases when the Top Leases differed from the underlying Subject Leases.[55] In 2005, Rocky Mountain Exploration, Inc. ("RME"), in partnership with Pitchblack and Whitetail Wave, LLC ("Pitchblack"), obtained Subject Leases that were five year leases. Later, RME granted overriding royalty interests ("ORRI") to Pitchblack which stated that the ORRI would burden "any extensions or renewals thereof [i.e. of the Subject Leases] entered into within 180 days of expiration of the applicable Lease."[56] In 2010 however, Hess acquired "almost all of the Subject Leases and Top Leases" through multiple assignments and transactions.[57] The Top Leases and Subject Leases were different either in terms, royalty amounts, consideration, or provisions.[58]

Pitchblack filed suit when Hess "denied that the overriding royalty interests burdened the Top Leases."[59] The district court granted summary judgment for Hess reasoning that the Top Leases were different than the

51. *Id.*
52. *Id.*
53. *Id.* at 451.
54. *Id.*
55. Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC, 949 F.3d 424, 431 (8th Cir. 2020).
56. *Id.* at 427.
57. *Id.*
58. *Id.*
59. *Id.*

Subject Leases.[60] Pitchblack appealed the ruling and argued that Hess owed a fiduciary duty to renew the leases.[61]

On appeal, the U.S. Court of Appeals for the Eighth Circuit found that North Dakota does not have an implied fiduciary duty in contract agreements and thus, the only way for Pitchblack to succeed was to show that the Subject Leases and Top Leases were "extensions or renewals of the Subject Leases."[62] Relying on Tenth Circuit precedent, the court held that leases were not extension or renewals when they materially differ.[63] Because the Top Leases differed in tracts of land, lease clauses, and lessees, the court found that the Top Leases were not extensions or renewals and affirmed the district court's grant of summary judgment in favor of Hess.[64]

SunBehm Gas, Inc. v. Equinor Energy, LP

The U.S. District Court for the District of North Dakota held that an operator does not have to pay interest on late royalty payments to an overriding mineral interest owner.[65] SunBehm owned an overriding royalty interest ("ORRI") in several oil and gas wells in which Equinor was the operator.[66] Equinor began operating at some sites in 2012, 2013, and 2014.[67] Equinor did not pay royalty interest to SunBehm until 2017.[68] As a result, SunBehm demanded interest on the late payments in accordance with North Dakota Century Code § 47-16-39.1 which states "if an operator fails to pay royalties to a mineral owner or their assignee within 150 days of the oil or gas being marketed, the operator owes interest on late payments at a rate of 18 percent per year."[69] After removing the suit to federal court, Equinor argued that N.D.C.C. § 47-16-39.1 did not apply to an ORRI.[70]

The court explained that an oil and gas lease creates a working interest for the operator.[71] An ORRI is "carved out of the working interest created

60. *Id.*
61. *Id.* at 428.
62. *Id. at 428–29.*
63. *Id.* at 430.
64. *Id.* at 431.
65. SunBehm Gas, Inc. v. Equinor Energy, LP, Case No.: 1:19-cv-94, 2020 WL 2025355, at *5 (D.N.D. Apr. 27, 2020).
66. *Id.* at *1.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at *3.

by an oil and gas lease."[72] Further, because an ORRI is created out of a lease, its lifespan is that lease.[73] Therefore, the court held that N.D.C.C. § 47-16-39.1 did not apply because an ORRI "arises" out of a lease and not the mineral estate.[74] The court also found that SunBehm was not a "mineral owner's assignee" for the same reason.[75] Thus, the court granted Equinor's motion to dismiss and dismissed the complaint with prejudice.[76]

Slawson Expl. Co., Inc. v. Nine Point Energy

The U.S. Court of Appeals for the Eighth Circuit held that an additional 10% payment to cover costs in an oil and gas exploration agreement was not a covenant that ran with the land when one of the original parties to the agreement went bankrupt.[77] Slawson and Triangle Petroleum Corporation ("TPC") entered into an oil and gas exploration and production agreement.[78] In the agreement within an area of mutual interest ("AMI"), Slawson was to share 30% interest from the leases it held in the AMI and TPC was to share 70% for the leases it held in the AMI.[79] This two year agreement also stated that Slawson and TPC would share costs in developing the leases using the same ratio agreement.[80] In addition, TPC agreed to pay an additional 10% share of the costs, on top of the 30% of costs it was already paying for in wells it chose to participate in, known as the Promote Obligation.[81]

TPC's successor in interest filed for bankruptcy and emerged as Nine Point, LLC.[82] Slawson then filed for a declaratory judgment against Nine Point and argued that the Promote Obligation was "a covenant running with the land, a real property interest, or an equitable servitude under North Dakota law."[83] The district court found that the Promote Obligation was not a covenant running with the land.[84]

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72. *Id.* (citation omitted).
73. *Id.* (citation omitted).
74. *Id.* at *4 (citation omitted).
75. *Id.* at *5.
76. *Id.*
77. Slawson Expl. Co., Inc. v. Nine Point Energy, LLC, 966 F.3d 775, 779 (8th Cir. 2020).
78. *Id.* at776.
79. *Id.* at 777.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at778.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reasoned that because the Promote Obligation did not benefit the land and was not a "promise to pay for the development or maintenance of property" that the Promote Obligation did not run with the land.[85] Further, the court found that the Promote obligation was not an equitable servitude because it did not "satisfy the elements of easement by estoppel."[86] Lastly, because the Promote Obligation was an "allocation of drilling costs" it was not an interest in real property.[87] Consequently, the court affirmed the district court's grant of summary judgment in favor of Nine Point.[88]

III. Legislative and Regulatory Developments

A. Legislative Enactments

No relevant oil and gas legislative enactments were passed between August 1, 2019, through July 31, 2020. The North Dakota legislature convenes on a biennial legislative cycle, and it will convene again in January 2021.[89]

B. Regulatory Changes

Chapter 43-02-03 (Oil & Gas)

The amendment to North Dakota Administrative Code ("NDAC") § 43-02-03-15, titled Bond and transfer of wells[90], provides that bond approval is mandatory prior to "construction of a site, appurtenance or road access."[91] Other changes include increasing the amount from $50,000 to $100,000 when the well utilizes commercial injection operations as well as requiring "a well temporarily abandoned for more than seven years to be counted in the six-well limit on a blanket bond."[92] Also, the change requires

85. *Id.* at 779.

86. *Id.* at780.

87. *Id.* at*780-81*.

88. *Id.* at781.

89. North Dakota. *Learn More About the Biennium Cycle*, https://www.legis.nd.gov/learn-more-about-biennium-cycle (last visited Aug. 7, 2020).

90. N.D. Admin. Code § 43-02-03-15.

91. North Dakota Oil and Gas Division. *Full Notice of Intent to Adopt and Amend Administrative Rules*, https://www.dmr.nd.gov/oilgas/Z.Rule_Changes.2020.2019-08-30.FullNotice.FiledwithLC.pdf (last visited Aug. 7, 2020).

92. *Id.*

"abandoned wells to be transferred to a bond in an amount equal to the cost of plugging and reclaiming the site."[93]

The amendment to NDAC § 43-02-03-28, titled Safety regulation,[94] provides that flares must be at least one hundred fifty feet from an active well or oil tank and requires written notice prior to conducting any well stimulation.[95]

Chapter 43-02-06 (Royalty Statements)

The amendment to NDAC § 43-02-06-01, titled Royalty owner information statement,[96] provides clarification on what information is required on a royalty information statement, how to calculate producer's net value, and how to calculate an owner's share of sales.[97]

The amendment to NDAC § 43-02-06-01.1, titled Ownership interest information statement,[98] provides that a company must produce an ownership interest information sheet when an owner's decimal interest changes.[99]

93. *Id.*
94. N.D. Admin. Code § 43-02-03-28.
95. North Dakota Oil and Gas Division.
96. N.D. Admin. Code § 43-02-06-01.
97. North Dakota Oil and Gas Division.
98. N.D. Admin. Code § 43-02-06-01.1.
99. North Dakota Oil and Gas Division.